85-1077 (1)

NO.

Supreme Court, U.S.
FILED
DEC 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

EMPLOYERS INSURANCE OF WAUSAU,
A MUTUAL COMPANY,
Petitioner

VERSUS

INGERSOLL-RAND FINANCIAL CORPORATION,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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55 pp

QUESTIONS PRESENTED FOR REVIEW

Should this Honorable Court review its previous decision in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 377 (1955), due to a conflict between the United States Court of Appeals for the Second Circuit and the United States Court of Appeals for the Fifth Circuit concerning the proper law to apply when there is no "applicable" state law regarding a particular marine insurance issue?

Should this Honorable Court review its previous decision in *Wilburn Boat* in light of the possible inapplicability of the decision to the facts of this case, given the paucity of Louisiana precedent interpreting "standard" mortgage clauses in Louisiana insurance policies?

Should this Honorable Court review its previous decision in *Wilburn Boat*, due to the need for uniformity in the marine insurance industry?

Have the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit departed from the established distinction between "named peril" and "all risk" marine hull insurance policies by granting recovery to a mortgagee under a standard mortgage clause when the risk which caused the loss was not among the named perils covered by the "named peril" marine hull insurance policy issued to the mortgagor?

LIST OF PARTIES

Pursuant to Supreme Court Rule 21.1(b) and 28.1, counsel for the Petitioner certifies that all parties to this proceeding are named in the caption of the case. Petitioner, Employers Insurance of Wausau, a Mutual Company, has the following affiliate: American Marine Underwriters, Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (hereinafter referred to as "App. A") is reported at 771 F.2d 910. The opinion of the United States District Court for the Eastern District of Louisiana (hereinafter referred to as "App. B") is not reported.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 23, 1985. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, §2, cl.1 of the Constitution of the United States provides, in pertinent part:

> The judicial Power shall extend ... to all Cases of admiralty and maritime Jurisdiction ....

28 U.S.C. §1333 provides, in pertinent part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
> 1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Rule 9(h) of the Federal Rules of Civil Procedure provides, in pertinent part:

> ADMIRALTY AND MARITIME CLAIMS.
>
> "A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c),

38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not...."

STATEMENT OF THE CASE

The controversy in suit arises from the disappearance of M/V SUZIE, an aluminum hull, offshore crewboat owned and operated by Mire Marine Service, Inc. [hereinafter referred to as "Mire" or as the "mortgagor"]. Original jurisdiction was proper in the United States District Court for the Eastern District of Louisiana [hereinafter referred to as the "District Court"] based upon 28 U.S.C. §1333, and Fed. R. Civ. P. 9(h).

The capital used to purchase M/V SUZIE, fifth-five thousand and NO/100 dollars ($55,000.00), was loaned to Mire by Ingersoll-Rand Financial Corporation (hereinafter referred to as "Ingersoll", the Respondent", or the "Mortgagee") on October 8, 1980. To secure the loan, Mire granted a First Preferred Ship Mortgage on M/V SUZIE to Ingersoll.

M/V SUZIE was insured under a "named peril" marine hull insurance policy bearing Policy No. EWH-3090 [hereinafter referred to as the "Policy"], issued by Employers Insurance of Wausau, a Mutual Company, (hereinafter referred to as "Employers" or as the "Petitioner") to Mire. Pursuant to Endorsement Number 14-A [hereinafter referred to as the "Endorsement"] of the Policy, Ingersoll was an additional assured under the Policy, as to M/V SUZIE. Coverage as to Ingersoll was limited to the unpaid principal on the amount loaned to Mire to purchase M/V SUZIE. The amount of unpaid principal was stipulated between the parties to be forty-five thousand four hundred eighty and 38/100 dollars ($45,480.38).

The loss of M/V SUZIE was caused by theft. Indeed, the District Court held "the great weight of the credible evidence reflects that the SUZIE was stolen." (App.B, p. A-12). The United States Court of Appeals for the Fifth Circuit (hereinafter referred to as the "Fifth Circuit") also noted, "Under the findings of fact of the district court, which are not clearly erroneous...the loss of the vessel was caused by the theft of the vessel...." (App. A, p. A-1).

The District Court held further the vessel was stolen as a result of the negligence of Mire, who was Employers' assured and the owner and manager of M/V SUZIE (App. B, p. A-13). In particular, the District Court held Mire had failed "to properly light its dock, to properly guard the vessel and in failing to adequately monitor the keys to the vessel." (App. B, p. A-13). The District Court then further noted,"...the theft of the vessel would not have occurred but for the negligence of Mire Marine." (App. B, p. A-13). In affirming the judgment of the District Court, The Fifth Circuit noted, "[T]he loss of the vessel was caused by the theft of the vessel, but the theft resulted from the negligent acts or omissions of the insured, Mire." (App. A, p. A-1).

The "named peril" marine hull insurance policy issued by Employers to Mire insured M/V SUZIE, her hull, tackle, apparel, engines, boilers, machinery, appurtenances, equipment, stores, boats and furniture from losses resulting from "the adventures and perils...of the waters named herein, fire, lightening, earthquake, assailing thieves, jettisons, barratry of the master and mariners and all other like perils that come to the hurt, detriment or damage of the vessel named herein." Acknowledging the restrictive nature of the named peril marine hull insurance policy, the District Court properly held "no coverage for the theft of the vessel [was] afforded in the underlying policy, including the Inchmaree Clause." (App. B, p. A-16). The Fifth Circuit further noted, "[b]oth parties agree that loss by theft of the vessel was not among the named perils covered by the policy; so that the insured mortgagor -

owner (Mire) could not itself recover on the policy for the present loss if occasioned by a theft of the vessel". (App. A, p. A-4).

Notwithstanding the restrictive nature of the named peril marine hull insurance policy, the respondent has contended throughout this litigation it is afforded coverage for the loss of M/V SUZIE under Endorsement 14-A of the policy. In the Endorsement, Employers entered into an agreement with Ingersoll, the mortgagee, admitted the seaworthiness of M/V SUZIE, and further agreed:

> [T]he interest of the mortgagee shall not be impaired or invalidated by any act of or omission or neglect of the mortgagor, owner, master, agent, crew, of the vessel(s) insured by this policy or by any failure to comply with any warranty or condition over which the mortgagee had no control or over which the mortgagee could, but has not exercised such control, or by any change in the title, ownership, or management of such vessel(s)...(App. A, p. A-4).[1]

The first major issue decided by both the District Court and the Fifth Circuit concerned the choice of law to be applied. Noting the absence of a specific and controlling federal rule, and citing to this Honorable Court's decision in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955), both courts decided to determine the outcome of the case by reference to "appropriate" state law, which, in this case, was the law of Louisiana.

After deciding to apply Louisiana law, however, the District Court noted, "... Louisiana jurisprudence on the precise issues involved in this case is not well defined and

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[1]The specific clause at issue in this case (i.e., "[T]he interest of the mortgagee shall not be impaired or invalidated by any act of or omission or neglect of the mortgagor....) shall be hereinafter referred to throughout this Petition as a "standard mortgage clause").

thus this Court must extrapolate a rule from available case law and from the decisions of other jurisdictions." (App. B, p. A-14). The "issue" was whether the standard mortgage clause in Endorsement No. 14-A could operate to enlarge the risks enumerated in the original named peril marine insurance policy, so as to afford coverage to Ingersoll for loss by theft. The Fifth Circuit further noted, "... the precise issue before us has not surfaced in any reported Louisiana decision we could find...". (App. A, p. A-7). Thus, bereft of any state court precedent, both the District Court and the Fifth Circuit looked to other jurisdictions for guidance. Citing a potpourri of varied state jurisprudence for what it considered to be controlling precedent, the Fifth Circuit noted:

> ...[T]he modern decisions are unanimous, and the earlier decisions virtually so, in holding that a mortgagee under a standard mortgage clause may (where not guilty himself of any breach of policy conditions) recover from the insurer for a loss sustained by the mortgaged property, even though the risk be excluded from the policy coverage, where any act of the mortgagor has caused or contributed to the loss as resulting from an excluded risk; and even though as between the mortgagor - insured and the insurer there is no coverage because of some default by the mortgagor." (App. A, p. A-6).

Thus, the Fifth Circuit held coverage was afforded to Ingersoll, the mortgagee, through Endorsement 14-A of Policy EWH-3090.

The petitioner respectfully suggests the Fifth Circuit erred in the following particulars:

a) By noting no Louisiana precedent could be found on the precise issue before it, and thereafter citing a potpourri of varied state precedent which it asserted supported its view, the Fifth Circuit may have wrongfully extended this Honorable Court's

holding in *Wilburn Boat Co. v. Fireman's Fund Insurance Co., supra*, beyond its intended breadth. Instead of attempting to decide what Louisiana courts would have done, in the absence of applicable jurisprudence, it is submitted the Fifth Circuit should have fashioned a general maritime rule of law of first impression, based on the clear distinction in the marine insurance field between "named peril" and "all risk" marine hull insurance policies. Further, instead of looking to the law of other states for guidance, which was not countenanced in the *Wilburn Boat* decision, the Fifth Circuit should have looked to the law of England, the "great field" of the marine insurance business. *Antilles S.S. Co. v. Members of American Hull Ins.*, 733 F.2d 195, 198 (2nd Cir. 1984).

b) Notwithstanding the choice of law issue, the Petitioner further respectfully suggests the case law cited by the Fifth Circuit does not support its holding. In fact, just the opposite is true. Jurisprudence from other states clearly supports the Petitioner's contention Endorsement Number 14-A did not insure the Respondent against the negligence of the mortgagor when no coverage for loss by theft existed in named peril marine Policy EWH-3090.

REASONS FOR GRANTING THE PETITION

I.

THIS HONORABLE COURT SHOULD REVIEW ITS PREVIOUS DECISION IN *WILBURN BOAT CO. V. FIREMAN'S FUND INSURANCE CO.*

A) The Fifth Circuit has extended *Wilburn Boat* beyond its proper bounds in the instant case, to the detriment of uniformity and certainty in the marine insurance field.

As heretofore noted, both the District Court and the Fifth Circuit attempted to apply Louisiana law to adjudicate the issue at bar. However, in both decisions, it was

noted Louisiana jurisprudence on the precise issue in suit was not well defined, and thus both lower courts borrowed what they thought was controlling precedent from available case law in other jurisdictions. Such an extrapolation was not intended by this Honorable Court's decision in *Wilburn Boat.*

In *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed 337 (1955), this Honorable Court held Texas law governed the consideration of a warranty contained in a fire insurance policy insuring a pleasure boat on a small man-made lake located between the states of Texas and Oklahoma. In determining the correct law to apply, this Honorable Court noted the crucial inquiries to be made in the case were: "(1) Is there a judicially established federal admiralty rule governing the warranties? (2) If not, should we fashion one?" *Id.*, 348 U.S. at 314, 75 S.Ct. at 370. Finding no judicially established federal admiralty rule, this Honorable Court noted two specific Texas statutes which may have controlled the issue at bar. *Id.*, 348 U.S. at 312, 75 S.Ct. at 369. After further noting the historically pervasive nature of the states' regulatory power regarding insurance matters, this Honorable Court held Texas law should apply to the alleged breaches of certain warranties in the marine insurance contract.

In a concurring opinion, Mr. Justice Frankfurter stated, "(w)hile not able to join the dissenters, [he could] only hope that what [were] essentially *dicta* [would] not be found controlling when situations which [had] not called them forth, and to which they [were] not applicable, [came] before the Court for adjudication. *Id.*, 348 U.S. at 324, 75 S.Ct. at 376. More particularly, Justice Frankfurter was of the opinion " ... the question, and the only question ... to be decided [was] whether the demands of uniformity relevant to maritime law require[d] that maritime insurance on a houseboat yacht brought to Lake Texoma for private

recreation should be subject to the same rules of law as marine insurance on a houseboat yacht 'confined,' after arrival, to the waters of Lake Tahoe or Lake Champlain." *Id.*, 348 U.S. at 322, 75 S.Ct. at 375. It was obvious Justice Frankfurter desired the holding be confined to its facts, as he further noted " for reasons that [he did] not appreciate, the Court's opinion [went] beyond the needs of the problem before it."*Id.*

Mr. Justice Reed and Mr. Justice Burton dissented from the majority opinion, and took great pain to outline the need for uniformity in marine insurance matters:

> State power may be exercised where it is complimentary to the general admiralty law. It may not be exercised where it would have the effect of harming any necessary or desirable uniformity. The cases decided by this Court make it plain that state legislation will not be permitted to burden maritime commerce with variable rules of law that destroy that uniformity.
>
> A vessel moves from State to State along our coasts and rivers. State lines may run with the channel or across it. Under maritime custom an insurance policy usually covers the vessel wherever it may go. If uniformity is needed anywhere, it is needed in marine insurance. It is like the question of seaworthiness which must be controlled by one law . . . . Insurers must know the risks they are assuming when they fix their premiums. What law is to govern - that of the State where the insurance contract was issued, the State of the accident, or the State of the forum? It seems an unreasonable interference with maritime activity to allow the many States to declare the substantive law of marine insurance." *Id.*, 348 U.S. at 332 -334, 75 S.Ct. at 381 -382.

This Honorable Court's decision in *Wilburn Boat* has not been without its critics. Two respected commentators

have noted:

"The decision in *Wilburn* is hard indeed to reconcile with the postulate of there being a federal maritime law at all; it is even harder to square with the assumption that the law of marine insurance is a part of that law. The opinion of the Court poses as its first question, "Is there a judicially established federal admiralty rule governing these warranties?" This seems to suggest the possibility that those questions of law concerning which litigation in the federal courts has been active enough to satisfy the Court's criteria of "establishment" are to be considered as ruled by maritime admiralty law, while those which for any reason (in this relatively non-litigious field) happen not to have reached the federal courts in volume are to be relegated to the legislative competency of the States. This is, with deference, a nightmarish solution; yet if it is not the one envisioned, why pose the question that way? . . .

Wilburn may mean merely that the States are to have a limited competency to regulate certain terms of marine policies. It could as a matter of cold logic be read to mean there is no federal maritime law at all. It may very well turn out to mean anything between these extremes." Gilmore & Black, The Law of Admiralty, §2-8 at pp. 69-71 (2d Ed. 1975). (citations omitted).

A second commentator further noted:

"In the United States, prior to the *Wilburn Boat* decision, and in many instances *after* the *Wilburn Boat* decision, the courts have adhered to the English Rule and held that a breach of warranty discharged the underwriter. *Wilburn* is an anomaly and should, when properly construed, be applicable only where there is a countervailing state statute which conflicts with the

English rule as to warranties." A. Parks, The Law of Tug, Tow, and Pilotage, (2d ed. 1982) p.541.

It is respectfully submitted the interpretation of a standard mortgage clause contained in a maritime insurance contract requires the application of a uniform rule. One must wonder what would happen if an identical standard mortgage clause was contained in an insurance policy covering a vessel owned by a New York corporation, which was insured by a Delaware corporation, and stolen in Louisiana. As will be discussed further *infra*, the exact opposite conclusion would have been reached by the Fifth Circuit, had it properly applied the law of Oregon, Missouri, or Texas to the facts of this case. It is submitted uniformity as to the meaning of these clauses would result in vessel owners, mortgagees, and vessel insurers understanding the precise meaning of such clauses. The application of a uniform rule would avoid the possibility of "crazy-quilt regulation of the different states what so long has been the business of the Courts[.]" *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. at 323, 75 S.Ct. at 376.

The novel distinguishing feature between the case at bar and the plethora of jurisprudence applying *Wilburn Boar* is that the precise issue in this case (i.e., the scope of an insurance endorsement containing a standard mortgage clause which is attached to a named peril marine insurance policy) is one step removed from this Honorable Court's decision in *Wilburn Boat*. Not only is there no admiralty precedent concerning this issue, there is similarily no Louisiana precedent regarding this specific issue. In this situation, the holding of *Wilburn Boat* may not apply.

In an analogous situation, the United States Court of Appeals for the Second Circuit [hereinafter referred to as the "Second Circuit"] looked to English precedent, rather than a "crazy guilt" pattern of state jurisprudence, in deciding a marine insurance issue which had not been addressed by "applicable" state precedent. In *Antilles S.S.*

Co. v. Members of American Hull Ins., 733 F.2d. 195 (2d Cir. 1984), a shipowner brought suit under a marine hull and machinery insurance policy to recover for the costs of removing cargo debris following a shipboard explosion. The Second Circuit first noted no "American" judicial precedent existed. *Id.* The Second Circuit presumably meant no American *maritime* judicial precedent existed, given its citation to *Wilburn Boat*, the previously discussed two step *Wilburn Boat* analysis, and the Second Circuit's subsequent discussion of New York precedent. *Id.*, 733 F.2d at 196-198.

The first issue before the Second Circuit concerned the proper law to apply. Instead of looking to the law of other states, as the Fifth Circuit did in the case at bar, the Second Circuit looked toward English precedent, since no New York precedent existed:

> "To the extent that no New York precedent exists, the maritime nature of this insurance contract dictates that we anticipate that New York courts would look to English law in view of the 'special reasons for keeping in harmony with the marine insurance laws of England, the great field in this business'. . . These sophisticated contracting parties should be presumed familiar with basic English law principals that have shaped custom and practice in the hull insurance field." *Id.*, 733 F.2d at 198 (Other citations omitted.) *See also, Lenfest v. Coldwell*, 525 F.2d 717, 724 (2d Cir. 1975).

Thus, a clear dispute exists between the Second and Fifth Circuit Courts of Appeal concerning the proper choice of law when no "applicable" state precedent exists.

II.

NOTWITHSTANDING THE CHOICE OF LAW ISSUE, THE FIFTH CIRCUIT MISCONTRUED THE VARIOUS STATE DECISIONS CITED BY IT

AND DEPARTED FROM THE ESTABLISHED MARINE INSURANCE DISTINCTION BETWEEN "NAMED PERIL" AND "ALL RISK" MARINE HULL INSURANCE POLICIES BY GRANTING RECOVERY TO A MORTGAGEE UNDER A STANDARD MORTGAGE CLAUSE WHEN THE RISK WHICH CAUSED THE LOSS WAS NOT AMONG THE NAMED PERILS COVERED BY THE MARINE HULL INSURANCE POLICY ISSUED TO THE MORTGAGOR.

As the Fifth Circuit correctly noted in its decision, Employers' marine hull insurance policy covering M/V SUZIE "was a 'named peril' policy, in which it insured the vessel against all the risks named in the perils clause (and, by implication, risks not named were not covered)" (App. A, p. A-3), (Other citations omitted). There is agreement among all parties the marine hull insurance policy in question was a "named peril" policy. Conversely, an "all risk" insurance policy creates a special type of coverage that extends to risks not usually covered under other insurance; recovery under an all-risk policy would be allowed for fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage. *Dow Chemical Co. v Royal Indem. Co.*, 635 F.2d 379, 386 (5th Cir. 1981); *See also, Morrison Grain Co, v. Utica Mut. Ins. Co.*, 632 F.2d 424, 430 (5th Cir. 1980). As was discussed further *infra*, there is universal agreement the loss of M/V SUZIE by theft in the suit at bar was not a covered risk, so as to allow the mortgagor coverage under the policy. However, the respondent argues Endorsement No.14-A provides policy coverage distinct and separate from the coverage provided to the mortgagor, despite the restrictive language of the Policy.

Under the terms of a standard mortgage clause, such

as is the case at bar,"...an independent or separate undertaking exists between the mortgagee and the insurer, which contract is measured by the terms of the mortgage clause itself. There are accordingly in substance two contracts of insurance, the one with the mortgagee and the other with the mortgagor." *May v. Market Insurance Co.*, 387 So.2d 1081, 1084 (La. 1980); *quoting*, Couch on Insurance 2d (1963), §42:694, now at 10A Couch on Insurance, 2d (Rev. ed. 1982) §42:728. (App. A,p.A-5).

It is as this point however, that the Petitioner respectfully maintains the Fifth Circuit did not follow through with the "separate" insurance analogy. The Court did not explain the "terms" of this "separate" insurance contract between the insurer, Employers, and the mortgagee, Ingersoll. The limitations on the "separate" contract between the mortgagee and the insurer are noted further on in the same commentary previously cited by the Fifth Circuit:

> "The rule that the standard loss clause creates a separate contract between the mortgagee and the insurer cannot be literally applied, to the exclusion of other provisions of the policy, for without those other provisions there would be no definition of the terms of the insurance, such as the property covered, the amount, and so-on. Rather the standard mortgage clause creates an independent contract of insurance for the mortagee's separate benefit, engrafted upon the main contract of insurance contained in the policy itself, which is rendered certain and understood by reference to the policy which makes it complete.
>
> In view of the applicability of the other policy provisions, *a mortgagee claiming under a standard mortgage clause asserts his right subject to all the terms and conditions of the contract of insurance*, except those which are expressly waived in the mortgage

clause....10A Couch on Insurance, 2d (Rev. ed. 1982) §42:731 at pp. 765-766 (emphasis supplied) (other citations omitted).

A standard mortgage clause then, simply "insure[s] that the mortgagee will not lose the protection *accorded it by the policy* because of acts or omissions of the insured *that defeat its rights under the policy.*" *Christopher & John, Inc. v. Maryland Casualty Co.*, 484 F.Supp. 609, 611 (S.D. N.Y. 1980) (emphasis supplied).

The limitation on the "separate" insurance analogy is further noted by another respected commentator:

> A distinction which is rather important to grasp is that the policy terms are themselves not nullified by a standard mortgage clause. It is, rather, that *a new contract containing those provisions* is made with the mortgagee personally; and the mortgagee is not bound by the mortgagor's contract which, while it may be identical in language, may be breached by the mortgagor's act." 5A Appleman and Appleman, Insurance Law and Practice, (1970) §3401 at p. 292 (emphasis supplied).

Notwithstanding the restrictive nature of "named peril" Policy No. EWH-3090, the Respondent argues, with the sanction of both lower courts, it can expand the perils included in the policy through the use of Endorsement 14-A. As will be discussed further *infra*, such an extrapolation is clearly not countenanced by the available case law. The end result of the Fifth Circuit's decision is the destruction of the clear distinction between all risk and named peril marine hull insurance policies, to the detriment of uniformity and certainty in the marine insurance field.

To properly understand the nature of the Respondent's argument, one must question what would happen in

the event there was no "act", "omission", or "neglect" on the part of Mire, the mortgagor, in the captioned suit. For example, if Mire had provided a watchman and had otherwise guarded M/V SUZIE in an adequate manner, and the vessel was still stolen, could the Respondent have recovered under Policy EWH-3090? This question must be answered in the negative, since, by reference to the terms of Policy No. EWH-3090, the "loss" in question did not result from a named peril. However, the Respondent argues, since an act or omission on the part of Mire caused the loss by theft in the instant case (which loss, by reference to the terms of Policy EWH-3090, is *still* not a covered risk), it is covered under Policy EWH-3090. Such is a remarkable conclusion, given the fact the named perils clause in Policy EWH-3090 has not changed. It is respectfully submitted it is essential there be coverage for the loss under the Policy itself for the provisions of Endorsement No. 14-A to come into play.

Ingersoll clearly has not one, but two distinguishable "interests" in the situation at bar. Naturally Ingersoll has a financial interest in M/V SUZIE. The company also has an interest in the separate insurance policy it purchased. The parameters of this insurance policy, however, are measured by the original "named peril" policy purchased by Mire. Thus, Ingersoll's insurance "interest" can rise no higher vis-a-vis the provisions of the named peril policy than Mire's interest. Mire's "act" did not, and could not, have caused Ingersoll to lose the protection accorded it by the Policy, since loss by theft was not a protection offered by Employers under the Policy. In effect, there was no insurance coverage to "lose." It is respectfully submitted other courts have followed this line of reasoning in analyzing standard mortgage clauses in insurance policies subjected to the laws of other forums.

In *Western Leasing, Inc. v. Occidental Fire and Casualty Co.*, 521 P.2d 352 (Ore. 1974)(en banc), suit was

brought by the [illegible] of a damaged trailer against an insurer seeking sums allegedly payable to the lessor as the "loss payee" under a standard loss payable endorsement (standard mortgage clause) on an insurance policy issued to the lessee of the trailer. The policy issued to the lessee included "collision or upset" coverage under which the defendant insurer agreed:

> "[T]o pay for direct and accidental loss of/or damage to the [trucks] hereinafter called loss, caused by collision of the [truck] with another object or by upset of the [truck[. . ." *Id.*, 521 P.2d at 352.

Under the standard loss payable endorsement, the insurer agreed:

> . . . [T]his insurance as to the interest of the bailment lessor, . . . *shall not be invalidated by any act or neglect of the lessee*, mortgagor, or owner of the within described automobile or other debtor, nor by any change in the title or ownership of the property . . . Id., 521 P. 2d at 353 (emphasis supplied).

The lessor's claim involved damage to one of the trailers leased by the lessee. A truck driver employed by the lessee struck a bridge in Iowa, and damaged the top of the trailer. The driver then continued on toward Portland, Oregon, notwithstanding the accident. The trailer collapsed in Montana and apparently became a total loss. The insurance company tendered payment of $2,500.00 for damages to the trailer caused by the initial accident, but refused to pay for the total loss of the trailer. The trial court previously found the lessee's driver negligently and carelessly continued to pull the loaded trailer approximately one thousand miles prior to the trailor collapsing, which resulted in the trailer's total destruction. Using important language, the Supreme Court of Oregon held the lessor was not entitled to recover from the insurer under

the provisions of the standard loss payable clause (standard mortgage clause) where the evidence supported the conclusion the damage to the trailer was not within the provision of the lessee's original policy for "collision" coverage:

> ". . . [A] 'standard' loss payable clause . . . constitutes an independent contract between the insurance company and the loss payee. . .
>
> Nevertheless, the coverage of the policy is not, as a result, extended to risks not otherwise covered by the policy. In other words, such a loss payee is entitled to payment for losses arising from risks that are covered by the policy, but is not, by the addition of a 'standard' loss payable clause, entitled to payment for losses arising from risks that are not covered by the policy. . .
>
> It follows that the first question to be decided in such a case is whether the loss was one which arose from a risk that was covered by the terms of this insurance policy, in this case, its provisions for 'collision or upset coverage'.
>
> In this case, the trial court made an express finding of fact that 'the damage resulting from the trailer striking the bridge [i.e., from the 'collision'] totaled $3,000.00 and that it was the "subsequent operation" of the truck and trailer that 'caused the trailer to be totally destroyed". *Id.*, 521 P. 2d at 353-354. (Other citations omitted).

The foregoing decision is indistinguishable from the situation at bar. Both lower courts in the instant case found the loss of M/V SUZIE was caused by theft. Since the theft was not a risk covered by the terms of the named peril marine insurance policy, coverage cannot be afforded to Ingersoll, notwithstanding the language of the standard

mortgage clause contained therein. As was the case in *Western Leasing, Inc. v. Occidental Fire and Casualty Co., supra*, notwithstanding an "act"or "omission" on the part of the mortgagor/lessee, if the loss did not arise from a covered risk, the loss was not covered under the terms of the applicable insurance policy.

Two Missouri appellate decisions also do not allow a mortgagee covered under a standard mortgage clause to recover when the loss arises from a risk which is not insured by the main insurance policy. In *General Motors Acceptance Corp. v. Western Fire Ins. Co.*, 457 S.W.2d 234 (Mo. App. 1970), the plaintiff, a mortgagee of a 1965 automobile, sought to recover as a loss payee named on an insurance policy issued by the defendant insurance company. By the terms of the policy, coverage was specifically eliminated when the automobile in question was driven by a Mr. Willard L. Betterton. While being driven by the aforesaid person on April 23, 1966, the automobile was damaged by collision. After the collision, the plaintiff/mortgagee presented proof of loss and demanded payment, since its interest was allegedly covered under a standard mortgage clause in the policy which provided "this insurance as to the interests of the . . .mortgagee. . .shall not be invalidated by any act or neglect of the lessee, mortgagor or owner of the within described automobile nor by any change in title or ownership of the property. . . ." *Id.*, 457 S.W.2d at 236. Notwithstanding the standard mortgage clause, the Missouri Appellate Court denied coverage to the mortgagee:

> ...[T]he plain and inescapable fact is that the [mortgagors] the named insureds, and ... [the insurer,] covenanted and agreed at the beginning of the contract year that the policy in suit would provide no insurance coverage whatever on [the automobile] while it was being operated by Willard L. Betterton. Hence, insurance on the [automobile] having been nonexistent

while he was driving, there was no coverage during such periods of Willard's operation which could have been 'invalidated', i.e. nullified . . . Furthermore, this state of noncoverage during such periods existed by reason of the unambigious terms of the policy contract and *not* 'by any act or neglect of' the owners-mortgagors. . .'In the stated circumstances, we agree with the learned trial judge that the standard mortgage clause in the [insurance] policy did not create coverage never afforded by that policy and that [the mortgagee] cannot compel payment of a loss against which [the insurer] never contracted to indemnify.

As mortgagee of the. . .[automobile] [the plaintiff] had an insurable interest therein. . .and with notice that the [insurance] policy afforded no coverage on that automobile while it was operated by Willard, [the plaintiff] could have obtained, or could have required the owners-mortgagors of the [automobile] to provide coverage on its insurable interest at all times. . . having failed to do so, it cannot avoid the consequences of its own inaction by shifting its loss onto the insurer in a policy which plainly provided no coverage while Willard was driving." *Id.* 457 S.W.2d at 236-239. (emphasis supplied).

Similarly, in *Avemco Ins. Co. v. Jefferson Bank & Trust Co.*, 613 S.W.2d 436 (Mo. App. 1980), a mortgagee claimed he was covered by an aircraft insurance policy for damages resulting from seizure of an aircraft by the Mexican government after the airplane crashed in Mexico. The owner of the aircraft, Mr. Fred Tomlin, obtained the policy of insurance from the insurance company which covered [a]ll loss or damage to the aircraft" including damage while in flight. *Id.*, 613 S.W.2d at 437. Specifically excluded from coverage in Exclusion (g) were "losses due to [1] ... any taking of the aircraft or any loss or damage

by any Government or Governmental authority or agent . . ." *Id.* The policy also contained a standard mortgage clause which provided ". . . this insurance as to the interest of the . . . mortgagee . . . will not be invalidated by any act or neglect of the lessee, mortgagor, or owner of the within described aircraft. . . ." *Id.*, 613 S.W.2d at 438.

On February 7, 1983, the mortgagor's aircraft crashed in Mexico. At the time of the crash, it was not being operated in violation of any condition or exclusion within the terms of the policy of insurance. *Id.*, 613 S.W.2d at 438. The insurer refused to pay, premising its refusal on Exclusion (g). The Missouri Appellate Court held the loss sustained by reason of the aircraft's seizure was not covered by the insurer's policy, notwithstanding the standard mortgage clause:

"Although the [standard mortgage] endorsement creates an independent agreement, it is not a complete contract in itself, rather it is "ingrafted upon the main contract of insurance contained in the policy itself [and is] to be rendered certain and understood by reference to the policy ...' It assures the leinholder that the *coverage provided by the policy* will not be invalidated by any act or neglect on the part of the mortgagor...

By Exclusion [g] the mortgagor was not insured against any loss to the aircraft resulting from seizure of the aircraft by the Mexican government. The seizure was not occasioned by any act or neglect of [the mortgagor] but rather was an incident specifically excluded from coverage under the terms of the policy.

Exclusion [g] is not a condition, the violation of which would work a forfeiture or void the coverage. By the terms of the policy, seizure by a foreign government

was a risk that was never assumed by the insurer. . . . The loss sustained by reason of the seizure of the aircraft was not covered by the insurer's policy." *Id.*, 613 S.W.2d at 438-439. (other citations omitted)(emphasis supplied).

In analyzing these two decisions, the Fifth Circuit noted '. . .the Missouri intermediate courts in each instance specifically found that no act of the mortgagor-insured had contributed to the loss excluded by the policy.' (App. A, p.A-8). The effect of this statement requires analysis. In both cases, the loss involved was specifically not covered by the policy of insurance. The real holding in both cases is that no coverage existed by reason of the terms of the policy and not by any act or neglect of the owners/mortgagors. The foregoing assertion of the Fifth Circuit was, therefore, essentially *dicta* and, in fact, aids the Petitioner, rather than the Respondent. In the case at bar, no coverage existed because loss by theft was not covered by the named peril policy and not because an "act" or "omission" of Mire contributed to the loss. *Mire's acts and/or neglect are inapposite since the loss, (i.e. theft of the vessel,) was not covered by the named peril marine hull insurance policy.* Mire's acts and/or neglect would only come into play under Policy EWH-3090 where the loss was otherwise covered under the terms of the named peril policy.

Finally, in *U.S. Trust & Guaranty Co. v. West Texas State Bank*, 272 S.W.2d 627 (Tex. App. 1954), the mortgagee of an automobile brought suit against the automobile's insurer to recover on the insurer's accident policy. The insurance policy in question covered damages caused by accidents occurring "while the automobile is within the United States of America, its Territories or Possessions, Canada or Newfoundland..." *Id.* 272 S.W.2d

at 628. By endorsement, the policy contained a standard mortgage clause which read, "loss or damage, if any, under the policy shall be payable as interest may appear to [the mortgagee] and this insurance, as to the interest of the-mortagagee-shall not be invalidated by any act or neglect of mortgagor-. . . " *Id.* The mortgagor's automobile was damaged in Mexico. On appeal, the mortgagee contended the purpose of the standard mortgage clause was to protect the mortagee from the act of the mortgagor in taking the automobile into Mexico. Disagreeing, the Texas appellate court rendered judgment for the insurer:

> "We think said endorsement does not grant additional coverage under the policy to anyone and that the unambiguous provision that the policy covers only accidents which occur 'while the automobile is within the United States of America. . .' excludes coverage of accidents which occur outside said territorial limits. Therefore, there was no coverage of the accident which occurred in Mexico.
>
> We recognize that the clause making the loss payable to the mortgagee regardless of any acts or neglect of the mortgagor, permits the mortgagee's recovery despite any violation of a "condition" by the mortgagor unknown to the mortgagee...The question here is not relative to such a matter. *The question is whether the accident that damaged the automobile was covered by the policy.* The plain, unambigious language of the policy compels the conslusion that while the automobile was without the territory covered by the Policy there was no coverage under the policy. This was not a condition, the breaking of which by the mortgagor was, according to the contract, not to affect the right of the innocent mortgagee.

> The Policy simply provided there was no insurance while the car was without the territory stated. . . . Since the [mortgagee's] claim is for damage to the automobile suffered outside of [the covered territory] it was not covered by the Policy." *Id.*, 272 S.W.2d at 628-630. (emphasis supplied) (other citations omitted).

The Fifth Circuit cited seven state court decisions, from states other than Louisiana, in support of its holding. (App. A,p. A-6). The Petitioner respectfully suggests the cited cases and holding of the Fifth Circuit misses the ultimate issue in this case. Before addressing whether an act or neglect of the mortgagor impaired the mortgagee's interest under the policy, the Fifth Circuit should have determined whether the risk (i.e. loss by theft) was covered by the terms of the marine insurance policy. In the cases cited by the Fifth Circuit, *the risk* which ultimately caused the loss in each insurance policy was a covered risk. The cases are to be distinguished from the cases cited *infra*, in which the risk was not coverd by the terms of the policy.

In *Underwriters, Etc. v. United Bank Alaska*, 636 P.2d 615 (Alaska 1981) an airplane leinholder brought suit against the aircraft owner and the aircraft insurer, who had extended coverage to the aircraft lessee, following destruction of the airplane in a crash. The aircraft had originally been purchased in 1977 from Mr. Linwood Marshall by Mr. Richard Burnette. On March 8, 1978, the appellant insurer isued a policy of airplane hull insurance under which Mr. Marshall was the named insured and under which various aircraft, several of which were not owned by Mr. Marshall, were particulary described. Included in the description was the aircraft owned by Mr. Burnette. The appellee bank was listed as the leinholder of Mr. Burnette's aircraft. On August 10, 1978, Mr. Marshall terminated a lease agreement with Mr. Burnette and deleted the aircraft from the reporting form, required by the insurance policy, on which he was to list those planes owned or leased by him. On

August 13, 1978 the airplane crashed and was totally destroyed. The relevant insurance policy clauses covered "direct physical loss of/or damage to the aircraft..." and further provided:

> "The insurance afforded under this policy shall apply to all standard licensed Fixed Wing Land aircraft owned by the Insured or operated under a lease or other agreement at the inception date of this Policy and it shall automatically apply to any additional standard licensed aircraft...." *Id.*, 636 P.2d at 617.

The policy also contained an endorsement containing a standard mortgage clause which identified the aircraft in question as subject to the lien of the bank. The endorsement also contained a notification clause and a clause which obligated the bank to pay any premiums Mr. Marshall failed to pay.

On appeal, the insurer argued the insurance coverage was limited to those aircraft which were owned or operated by the insured at the time of the accident. The insurer further argued that since, at the time of the crash, August 13, 1978, Mr. Burnette's aircraft was not operated by the insured, Mr. Marshall, under a lease or other agreement, the insurance policy provided no coverage. The Supreme Court of Alaska did not find the argument persuasive:

> "The aircraft covered clause speaks only to the inception of coverage, not to its cessation. The clause provided that coverage will begin for any aircraft which is owned or operated by the insured either at the inception date of the policy or thereafter during the policy term.
>
> With respect to [the lienholder], it is clear that none of the other clauses of the policy apply to defeat coverage

> in this case. [The breach of warranty endorsement] contains three relevant provisions. First, the acts or neglect of the insured, Linwood Marshall, could not invalidate [the Bank's] lienhold interest. Second, [the Bank] was obligated to pay any premiums which Linwood Marshall failed to pay. Finally, the bank was entitled to 30 days notice before coverage could be cancelled.
>
> The fact that Marshall terminated the lease and did not report the aircraft as a covered plane after August 10, 1978, does not impair [the Bank's] right to recover. The breach of warranty clause [i.e. standard mortgage clause] specifically protects the bank against 'acts' of the insured, including unilateral cancellation, absent effective notice." *Id.*, 636 P.2d at 618.

Thus, in this case, the risk (direct physical loss of the airplane) was specifically covered under the terms of the insurance policy. The insured's "acts" could not prejudice the lienholder's right to collect under the insurance policy for a loss which was specifically covered under the policy.

In *American National Bank & Trust Co. v. Young*, 329 N.W. 2d 805 (Minn. 1983), a mortgagee bank filed suit against an insurer who furnished coverage on an airplane. The policy included an endorsement with a standard mortgage clause. The airplane was flown to Columbia, where it was seized by the Columbian government.

Neither party disputed the fact the airplane was being used in drug trafficking operations at the time of its seizure. Two exclusions in the policy noted coverage was not provided "during or in connection with a flight involving any trafficking in narcotics, drugs, or involving the unlawful importation or exportation of property or persons... or

any loss due to ... seizure ... or any taking of the aircraft or any loss or damage thereof by any Government or governmental authority..." *Id.*, 329 N.W. 2d at 808. The policy also noted "The policy applies only to occurrences, accidents and losses during the policy period while the aircraft is in the Western Hemisphere north of 16° North Latitude. *Id.*, 329 N.W. 2d at 809. The Minnesota Supreme Court affirmed the grant of coverage, holding:

> "[The mortgagor by his acts or neglect breached the conditions and exclusion of his policy. He may not recover under his policy of insurance. However, his conduct cannot defeat [the mortgagee's] right to recover." *Id.*, 329 N.W. 2d at 813.

The decision is the only decision cited by the Fifth Circuit which lends some support to its holding. However, the decision fails to address the most important issue in the situation at bar, which the Oregon Supreme Court addressed in *Western Leasing, Inc. v. Occidental Fire and Casualty, supra,* (i.e. Did the loss arise from a risk covered by the applicable insurance policy?) Once this question is answered in the affirmative, then, and only then, should a court determine if an "act" or "omission" of the mortgagor caused a loss which was otherwise covered by the insurance policy, to be excluded from coverage. The Minnesota Supreme Court did not address whether the loss(seizure by a foreign government) was a covered risk.

A similar airplane loss resulted in an interesting decision in *Security Ins. Co. v. Commercial Credit Equip.*, 399 So.2d 31 (Fla. App. 1981). In that case, an airplane owner purchased insurance which provided coverage for "any direct physical loss..." *Id.*, 339 So.2d at 32. In addition, the owner purchased coverage of the mortgagee's interest under a breach of warranty endorsement to the policy through a telex binder. The binder provided "all risk

ground and flight hull" coverage. *Id.* An exclusion in the *owner's* policy noted no coverage was afforded for detention or restraint by a governmental authority. However, the breach of warranty endorsement (which contained a standard mortgage clause) contained its own exclusions, none of which excluded loses for detention or restraint by governmental authorities.

The owner's airplane was subsequently flown to Columbia, South America, where it was detained by the Columbian government. When the mortgagee sued for its loss, the insurance company denied coverage. The Florida appellate court affirmed the grant of coverage in favor of the mortgagee, and held *inter alia*, the terms of the warranty endorsement itself created all risk coverage in favor of the mortagee:

> "The only insurance agreement delivered to [the mortgagee] was the Telex binder ... providing all risk coverage ...
> We, therefore, conclude that exclusions in the main policy do not apply to the breach of warranty endorsement which provides coverage for 'loss or damage'.
>
> Next, the insurer...contends that 'loss' must be a direct physical loss, such as damage to the aircraft, but not its detention or destruction. We disagree. The breach of warranty endorsement uses the term 'loss' not direct physical loss." *Id.*, 399 So.2d at 34.

Instead of supporting its holding, as the Fifth Circuit maintains, just the opposite is true. Implicit in the Florida appellate court's holding is the underlying principle that coverage would not have been afforded to the mortgagee had the endorsement not expressly expanded the risks covered in the original policy.

In *Hartford Fire Ins. Co. v. Associates Capital Corp.*, 313 So.2d 404 (Miss. 1975), a mortgagee filed suit against a fire insurer to recover on an insurance contract issued to the mortgagor. The fire insurance contract in question contained standard mortgage clause language, which protected the mortgagee from "any act or neglect of the mortgagor...." *Id.*, 313 So.2d at 408. The thrust of the testimony at the trial level was that the mortgagor employed two persons to burn the insured property. Thus, the case is easily distinguishable from the case at bar, since the risk insured against (fire) was obviously covered under both the mortgagee and the mortgagor policies. If the mortgagor had not burned the property, the mortgagee was entitled to recover under the loss-payable clause. *Id.*, 313 So.2d at 406. If the mortgagor had the property destroyed, the mortgagee was still covered, since this was an "act" or "omission" of the mortgagor which would have precluded coverage for a risk which otherwise would have been covered.

In *Fort Hill Fed. S & L v. S. C. Farm Bur. Ins.*, 316 S.E.2d 684 (S.C. App. 1984), an insurer issued a fire policy to the mortgagors, which policy contained a standard mortgage clause naming the mortgagee as loss payee. The mortgagors forwarded a bad check for the insurance premium. The insurance company mailed a notice of cancellation to the mortgagors and the mortgagee. However, the fire insurance policy in question provided "... in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee... shall, on demand pay the same....This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee for ten days after notice to the mortgagee ... of such cancellation..." *Id.*, 316 S.E. 2d 686. The South Carolina appellate court affirmed the grant of coverage, notwithstanding the mortgagors' failure to pay the policy premium.

Once again, the risk insured against (loss by fire) was clearly a risk covered under the terms of the policy agreement. However, an act of the mortgagors (failure to pay the premium) could not abrogate the right of the mortgagee to recover for a risk clearly covered by the fire insurance policy.

In *Charter Bank of Boonville v. Shelter General Insurance*, 664 S.W.2d 44 (Mo.App. 1984), the bank, whose predecessor was named as loss payee in an automobile collision policy, brought suit to recover under the loss payable clause (standard mortgage clause) for collision damages caused to a pickup truck. The insureds permitted the policy to lapse by not paying the insurance premium. Subsequent to allowing the policy to elapse, the insureds purchased a replacement truck for the truck previously covered under the collision policy. The insurance policy required the lienholder (Bank) be given notice of cancellation or termination. The policy also mandated the bank be provided with the election within ten days after such termination to pay the premium and continue the policy in force. The Missouri appellate court, in this instance, held there was valid coverage vis-a-vis the bank's interest. The risk which caused the loss (collision) was obviously a risk insured against under the collision policy. The fact that the insureds allowed the policy to lapse was of no moment, since this was an "act" which precluded coverage as to the insureds, but had not effect on the policy as to the lienholder.

In *Don Chapman Motor Sales v. National Savings Insurance Co.*, 626 S.W. 2d 592 (Tex. App. 1981) the mortgagee, a loss payee on a physical damage automobile policy,sued the insurance company for recovery under the policy. The policy contained a standard mortgage clause endorsement. An exclusion in the policy provided: "this

policy does not apply... while the automobile is operated by...any person under the minimum age required to obtain a license to operate a private passenger automobile..." *Id.*, 626 S.W. 2d at 594. The automobile was subsequently wrecked by the mortgagee's son, who did not have a driver's license. The Texas court affirmed the grant of coverage. Once again, the risk (loss through physical damage) was obviously covered under the terms of the insurance policy. An act of the mortgagor (allowing her son to drive the automobile without a license) triggered an exclusion which otherwise would have resulted in coverage under the policy.

CONCLUSION

For the reasons set forth above, it is respectfully submitted this Petition for Certiorari should be granted.

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APPENDIX A

INGERSOLL-RAND FINANCIAL CORP.,
Plaintiff-Appellee,

v.

EMPLOYERS INSURANCE OF WAUSAU,
a Mutual Co.,
Defendant-Appellant.

No. 84-3463

United States Court of Appeals
Fifth Circuit.

Sept 23, 1985

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, POLITZ, and TATE, Circuit Judges.

TATE, Circuit Judge:

Based upon admiralty and maritime jurisdiction, 28 U.S.C. § 1333, Fed. R. Civ. P. 9(h), the plaintiff-mortgagee ("Ingersoll-Rand") sues the defendant hull insurer ("Employers") of a vessel to recover under a "standard" loss-payee mortgage clause. The hull insurance policy issued to the insured owner-mortgagor ("Mire") of the vessel covered only named perils; these did not include the theft of the vessel. Under the findings of fact of the district court, which are not clearly erroneous, Fed.R.Civ.P. 52(a), the loss of the vessel was caused by the theft of the vessel, *but* the theft resulted from the negligent acts or omissions of the insured, Mire. The district court granted Ingersoll-Rand, the plaintiff-mortgagee, recovery against

Employers, the defendant insurer; the latter appeals, contending that the mortgagee cannot recover for a risk not covered by the insuring agreement between the owner-mortgagor and the insured.

We affirm. The standard mortgage clause creates a separate contract of insurance between the insurer and the mortgagee, and this clause provided that the interest of the mortgagee shall not be impaired "by any act of or omission or neglect" of the mortgagor-owner—in the present case, being the negligent acts and omissions that resulted in the theft of the insured vessel.

I

[1,2] Preliminarily, althougth the present marine hull insurance policy is a maritime contract falling within the admiralty jurisdiction of the federal courts, *New England Marine Insurance Company v. Dunham*, 78 U.S. (11 Wall.) 1, 34-36, 20 L.Ed. 90, 100-01 (1871), nevertheless, the interpretation of a contract of marine insurance is—in the absence of a specific and controlling federal rule—to be determined by reference to appropriate state law. *Wilburn Boat Company v. Firemen's Fund Insurance Company*, 348 U.S. 310, 312-16, 75 S.Ct. 368, 369-71, 99 L.Ed. 337 (1955). No countervailing federal rule is cited to us. The district court correctly determined that Louisiana law was—in the view of that state's substantial and legitimate interest—the appropriate state law to resort to for the interpretation of the present marine hull insurance contract and endorsements: The policy was delivered in Louisiana to insure Louisiana property of the Louisiana mortgagor-owner, with the loss occurring in Louisiana, and with both parties to the present action being foreign corporations authorized to do business in Louisiana, out of which Louisiana

doing business arose the present litigation. *Walter v. Marine Office of American*, 537 F.2d 89, 94 (5th Cir. 1976); *Irwin v. Eagle Star Insurance Company, 455 F.2d 827, 829-30 (5th Cir.), cert, denied*, 409 U.S. 852, 93 S.Ct. 118, 34 L.Ed.2d 95 (1972).[1]

Employers' hull insurance policy covering the vessel was a "named peril" policy, in which it insured the vessel against all the risks named in the perils clause (and, by implication, risks not named were not covered). Gilmore and Black, The Law of Admiralty, § 2-9 at pp. 71-72 (2d ed. 1975).[2] In the present policy, for instance, the named perils included "the adventures and perils of the waters ..., fire, lightning, earthquake,"etc.; also, loss of or damage to the vessel caused by *accidents* "in loading, discharging or handling cargo, or in bunkering," breakdown of motor generators or other electrical equipment, "negligence of charterers and/or repairers," "negligence of master, mariners, engineers or pilots, "etc. (The accidental loss was not covered, however, if it "resulted from want of due diligence by the assured, the owners or managers of the vessel, or any of them.")

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[1] We advert to these well-settled principles only because the defendant Employers on appeal contests their application, without advancing arguable reasons to the contrary. Employers does not, for instance, point to any federal rule contrary to the interpretations adopted by the Louisiana courts, which are, moreover, in accord with the interpretations adopted by the great majority of other American state jurisdictions.

[2] A "Named peril" policy is to be differentiated from an "all risks" policy. A policy of insurance insuring against 'all risks' creates a special type of coverage that extends to risks not usually covered under other insurance; recovery under an all-risk policy will be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage." *Dow Chemical Company v. Royal Indemnity Company*, 635 F.2d 379, 386 (5th Cir. 1981).

Both parties agree that loss by theft of the vessel was not among the named perils covered by the policy; so that the insured mortgagor-owner (Mire) could not itself recover on the policy for the present loss if occasioned by a theft of the vessel. The crux of the insurer Employers' argument, not supported however by most if not all of the cases cited by it (see note 3, *infra*), is that the mortgagee-additional insured Ingersoll-Rand could not receive coverage by its standard mortgage clause (see II below) for a risk not covered by the principal policy to which this standard mortgage clause was an endorsement.

II

The plaintiff Ingersoll-Rand had loaned Mire, the owner-insured of the stolen vessel, $55,000 and had been granted a first preferred ship mortgage on the vessel to secure the note. Ingersoll-Rand by endorsement to the hull policy issued by Employers to Mire was made an additional loss payee with regard to the insured vessel. By further endorsement, and in consideration of the premium included, the insurer Employers entered into an agreement with Ingersoll-Rand, the mortgagee; that seaworthiness of the vessel was admitted, and further agreed that:

> [T]he interest of the mortgagee shall not be impaired or invalidated by any act of or omission or neglect of the mortgagor, owner, master, agent, crew, of the vessel(s) insured by this Policy or by any failure to comply with any warranty or condition over which the mortgagee had no control or over which the mortgagee could, but has not exercised such control, or by any change in the title, ownership, or management of such vessel(s) ...

[3] This is what is known as a "standard" or "union" mortgage clause. *May v. Market Insurance Company*, 387 So.2d 1081, 1083-84 (La.1980); 10 Couch on Insurance 2d (Rev.ed), § 716 (1982). Under this clause, "an independent or separate undertaking exists between the mortgagee and the insurer, which contract is measured by the terms of the mortgage clause itself. There are accordingly in substance two contracts of insurance, the one with the mortgagee, and the other with mortgagor." *May, supra*, 387 So.2d at 1084, quoting § 42:694, Couch on Insurance 2d (1963) now at Couch on Insurance 2d (Rev.ed. 1982) § 42:728. As is uniformly held, under a standard mortgage clause the mortgagee may recover for the loss of the insured property (up to the amount of his debt and within the limits of the mortgage clause) despite a policy defense against the mortgagor-insured himself, at least where (as here) the fault or neglect of the latter has occasioned the loss to the detriment of the interest of an insured mortgagee, *See also* Couch on Insurance 2d, *supra*, §§ 717, 719, 720,725, 728, 736-739; 5 Appleman and Appleman, Insurance Law and Practice, § 3401 at pp. 282, 289-93 (1970). An notation, "Insured's Fraud—Loss Payee's Rights," 24 ALR 3d 435, 439-40 (1969).[3]

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[3]The "standard" or "union" mortgage clause here applicable is to be distinguished from the "simple" or "open" mortgage clause. The latter simply provides that the proceeds of the policy shall first be paid to the mortgagee as his interest appears, but it does not provide a separate undertaking that the mortgagee's interest shall not be impaired by any act or neglect of the insured-mortgagor. In effect, the "simple" mortgage clause is simply to make the mortgagee an appointee of the insurance fund, with a right of recovery no greater than that of the mortgagor-insured. *See May, supra*, 387 So.2d at 1083; Couch on Insurance 2d, *supra*, §§ 42:693, 694; Appleman, Insurance Law and Practice, *supra*, § 3401 at pp. 282-84, 293-95; Annotation, *supra*, 24 ALR 3d at 437.

In Employer's argument that the loss-payee mortgage clause can afford the mortgagee no greater rights than the coverage afforded by the principal policy, at least some of the decisions relied upon by Employers, *e.g., Wells Fargo Bank International Corporation v. London*

Where the issue has been squarely presented, the modern decisions are unanimous, and the earlier decisions virtually so, in holding that a mortgagee under a standard mortgage clause may (where not guilty himself of any breaches of policy conditions) recover from the insurer for a loss sustained by the mortgaged property, even though the risk be excluded from the policy coverage, where any act of the mortgagor has caused or contributed to the loss as resulting from an excluded risk; and even though as between the mortgagor-insured and the insurer there is no coverage because of some default by the mortgagor. The more recent decisions include: *Underwriters at Lloyd's London v. United Bank Alaska*, 636 P.2d 615, 618 (Alaska 1981); *American National Bank and Trust Company v. Young*, 329 N.W.2d 805, 811-13 (Minn.1983); *Hartford Fire Insurance Company v. Associates Capital Corporation*, 313 So.2d 404, 407-08 (Miss.1975); *Fort Hill Federal Savings and Loan Association v. South Carolina Farm Bureau Insurance Company*, 281 S.C. 532, 316 S.E.2d 684, 687-88 (1984); *Security Insurance Company of Hartford v. Commercial Credit Equipment Corporation*, 399 So.2d 31,34 (Fla.App.), *pet. for rev. denied*,411 So.2d 384 (Fla.1981); *Charter Bank of Boonville v. Shelter General Insurance*, 664 S.W.2d 44, 46-47 (Mo. App.1984); *Don Chapman Motor Sales, Inc. v. National Savings Ins. Co.*, 626 S.W.2d 592, 596-97 (Tex.App.1982), *writ refused, no reversible error* (Tex.1983).

The rationale of these decisions may be summarized as follows:

The provision in the standard mortgage clause that with respect to the mortgagee the insurance shall not be

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Steam-Ship Owners' Mutual Insurance Associations, 408 F.Supp. 626 (S.D.N.Y.1976), distinguishably concern a "simple" mortgage clause.

invalidated by any act of the mortgagor does "not refer merely to acts prohibited by the contract or to failure to comply with the terms thereof, but literally embrace[s] *any* act of the mortgagor" that leads to impairment of the mortgagee's insurance protection afforded by the clause. 10 Couch on Insurance 2d (Rev.ed.) § 42:719, p. 755)(emphasis added). "This clause constitutes an independent contract between the insurer and the mortgagee covering the mortgagee's insurable interest, and not merely the property, and is affected only by acts of the mortgagee." *Don Chapman Motor Sales, Inc., supra*, 626 S.W.2d at 597. The intent of the standard mortgage clause is that "the mortgagee's right to recover will not be invalidated by the act or negligence of the mortgagor" and that "no act or default of any person other than the mortgagee ... shall affect the rights of the mortgagee to recover in case of loss." *Hartford Fire Insurance Company, supra* 313 So.2d at 407. *See* Couch on Insurance 2d, *supra*, § 42:736. " '[I]nsofar as the provisions of the policy are inconsistent with or antagonistic to the clause protecting the interest of the mortgagee, they must be regarded as inapplicable in determining his rights.' " *Security Insurance Company of Hartford, supra*, 399 So.2d at 34 (quoting from treatise text now found at Couch on Insurance 2d (Rev.ed.) § 42:720 (1982)).

[4] Although the precise issue before us has not surfaced in any reported Louisiana decision we could find, there is no reason to conclude that Louisiana would not adopt the nigh-uniform construction by other jurisdictions of the protection afforded a mortgagee's interest a standard mortgage clause, which Louisiana recognizes as affording independent coverage to the mortgagee in accord with the terms of the clause. *May v. Market Insurance Company*, 387 So.2d 1081, 1084 (La.1980). Thus, although here the theft of the insured vessel was not a risk covered by the

policy between the mortgagor-insured and the insurer, the loss of the vessel was nevertheless insured as to the mortgagee's interest under the terms of the standard mortgage clause agreement between the mortgagee and the insurer, because the theft-loss of the vessel resulted from the negligence of the mortgagor.

Only two decisions cited by Employers lend some support to its contention that the protection afforded a mortgagee by a standard mortgage clause may not afford the mortgagee coverage excluded by the unambiguous terms of the policy: *Avemco Insurance Company v. Jefferson Bank & Trust Company*, 613 S.W.2d 436, 438 (Mo.App.1980) and *General Motors Acceptance Corporation v. The Western Fire Insurance Company*, 457 S.W.2d 234, 237 (Mo.App.1970). There, however, the Missouri intermediate courts in each instance specifically found that no act of the mortgagor-insured had contributed to the loss excluded by the policy.[4] However, if—as here—an act or neglect of the mortgagor had invalidated the insurance, Missouri would like all other jurisdictions have given the standard mortgage clause a broad construction that afforded independent coverage to the mortgagee. *Charter Bank of Boonville, supra*, 554 S.W.2d at 46; *Equality Savings and Loan Association v. Missouri Property Insurance Placement Facility*, 537 S.W.2d 440, 441-42 (Mo.App.1976).

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[4]In so doing, the Missouri intermediate courts characterized an "act" of the mortgagor that impaired coverage less broadly than did the decisions cited in this opinion (which included not only the mortgagor's act but also its foreseeable consequences within the clause's protection against impairment of the mortgagee's security), a distinction critically noted in *American National Bank and Trust Company v. Young*, 329 N.W.2d 805, 811-12 (Minn.1983) as representing an isolated view.

We thus find no merit to the defendant Employers' contentions on appeal.[5]

Conclusion

Accordingly, we AFFIRM the judgment of the district court granting the mortgagee Ingersoll-Rand recovery under its standard mortgage clause for the unpaid secured debt upon the stolen vessel.

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[5]The defendant finally contends that a ruling that protects the mortgagee in this case will promote deliberate and fraudulent acts by a mortgagor that lead to loss of his vessel and the payment of his debt through the insurance proceeds. This argument overlooks that the standard mortgage clause provides that, upon payment to the mortgagee, the mortgagee's claim and security interest are assigned to the insurance company to the extent of the payments received, thus giving the insurance company the right to collect from the mortgagor the debt still owed by him to the mortgagee.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INGERSOLL-RAND FINANCIAL CORPORATION	CIVIL ACTION
VERSUS	NUMBER 82-5665
EMPLOYERS INSURANCE OF WAUSAU, A Mutual Company	SECTION "L"

Filed June 4,1984
Date of Entry June 5, 1984

JUDGMENT

Considering the written reasons on file herein and the direction of the Court as to the entry of judgment; accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Ingersoll-Rand Financial Corporation and against defendant, Employers Insurance of Wausau in the sum of $45,480.38 plus interest from the date of loss and all costs of this proceeding.

New Orleans, Louisiana, this 31 day of May, 1984.

/s/ Veronica D. Wicker
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INGERSOLL-RAND FINANCIAL CORPORATION — CIVIL ACTION

versus — NUMBER 82-5665

EMPLOYERS INSURANCE OF WAUSAU
A Mutual Company — SECTION L

Filed
May 29, 1984
Date of Entry May 30, 1984

Plaintiff, Ingersoll-Rand Financial Corporation, brings suit against defendant, Employers Insurance of Wausau, claiming that it is entitled to recover under a hull insurance policy issued by the defendant covering the MV SUZIE. The MV SUZIE was lost on December 14, 1981. It was owned and operated by Mire Marine Services, Inc., not a party to this suit. This matter was submitted to the Court on a former date. After considering the record, the stipulations of the parties, the evidence adduced at trial, the briefs of counsel and the applicable law, the Court issues the following Findings of Fact and Conclusions of Law, to wit:

FINDINGS OF FACT

1. Plaintiff, Ingersoll-Rand Financial Corporation (hereinafter Ingersoll-Rand) is the holder of a promissory note secured by a First Preferred Ship Mortgage executed by Mire Marine Service, Inc., the owner of the MV SUZIE. (Exhibits A and B)

2. At all times pertinent hereto, the SUZIE was covered by a hull insurance policy issued by the defendant, Employers Insurance of Wausau, which named plaintiff as an additional loss payee. (Exhibit F) Also in effect was a breach of warranty endorsement to the policy, admitting the seaworthiness of the vessel, whereby Employers agreed that the interest of the mortgagee, Ingersoll-Rand, was not to be impaired or invalidated by any negligence of the mortgagor, owner, master, agent or crew of the vessel. (Exhibit G)

3. On or about December 11, 1981, Owen Mire, President of Mire Marine, moored the vessel at its dock on the Intercoastal Waterway. On December 14, Mire discovered that the SUZIE was missing. Immediately thereafter, Mire contacted the bridge tender at the Louisa Street Bridge and the lockmaster at the Bayou Bouef locks. Both reported that their logs did not reflect that the vessel had effected passage through the locks or the bridge and the vessel has never been recovered to this date. (deposition of Owen Mire)

4. It is undisputed that the premiums on the policy were timely paid and that demand for payment was properly made to the defendant.

5. After defendant refused to make payment on the policy, Ingersoll instituted this suit to recover the outstanding principal under the policy.

6. Defendant contends that the vessel was stolen and accordingly is not covered under the policy provisions. The great weight of the credible evidence reflects that the SUZIE was stolen. The vessel had been left unattended for two or three days, and the keys were easily obtainable and

transferable by the various crew members and other employees of Mire Marine. Moreover, the Mire Marine dock was poorly lighted and in a remote and isolated area. (Deposition of Owen Mire) It is undisputed that the vessel could have been navigated into the Gulf of Mexico or the Atchafalya River without passing the Louisa Street Bridge or through the Bayou Bouef locks. Plaintiff's contention that the vessel was rammed by an oncoming tug or swept away by a current is based on mere speculation. There was no debris found at the Mire dock after the disappearance which would have indicated loss by collision, or heavy current. Furthermore, there was no evidence presented that the SUZIE was improperly moored, nor was any trace of the vessel ever discovered. (Deposition of Owen Mire)

7. However, the evidence reflects that Mire Marine, the owner of the MV SUZIE was negligent in failing to properly light its dock, to properly guard the vessel and in failing to adequately monitor the keys to the vessel. In his deposition, Owen Mire, President of Mire Marine testified that a watchman should have been posted over the SUZIE, and that many employees of the company possessed keys to the vessel and that these keys were unmonitored by the Company and easily copied. Accordingly, the Court finds that the theft of the vessel would not have occurred but for the negligence of Mire Marine.

8. It is undisputed that the indebtness of Mire Marine to plaintiff under the aforementioned note as of time of the loss is $45,480.38.

CONCLUSIONS OF LAW

1. This is an admiralty and maritime claim within the meaning of Rule 9(h), 28 U.S.C. §1333; *Insurance Co. v. Dunham*, 78 U.S. (11 Wall) 1 (1970).

2. The first legal isue to be decided is what law should be applied in interpreting the relevant portions of the policy in question. In *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955), the Supreme Court held that in the absence of applicable federal statutes or judicially established federal admiralty law, the district court should look to the law of the appropriate state for guidance. Since none of the cases cited by the parties in their briefs, nor any other cases discovered by this Court reveal that this matter has been addressed by federal authorities, the Court must turn to state law. *See Walter v. Marine Office of America*, 577 F.2d 89 (5th Cir. 1976); *Travelers Indem. v. Certain Underwriters at Lloyds*, 566 F. Supp. 267 (E.D. La 1983). Louisiana law would undoubtably be the appropriate state law to apply, since the loss of the vessel occurred in Louisiana, the owner of the vessel is a Louisiana resident and the parties are corporations doing business in Louisiana. *Walter v. Marine Office of America, supra*, at 94; *Travelers Indem. v. Certain Underwriters at Lloyds, supra*, at 269. Unfortunately, Louisiana jurisprudence on the precise issues involved in this case is not well-defined and thus this Court must extrapolate a rule from available case law and from the decisions of other jurisdictions.

3. Plaintiff contends, *inter alia*, that it is afforded coverage for the loss of the SUZIE under Endorsement 14-A of the policy. Endorsement 14-A provides, in pertinent part, that

> [I]n consideration of an additional premium... seaworthiness of the vessel(s) insured by this Policy as between this Company and [plaintiff] hereinafter [called] the mortgagee...is hereby admitted, and the interest of the mortgagee shall not be impaired or invalidated by

any act of or omission or neglect of the mortgagor, owner, master, agent, crew of the vessel(s) insured by this Policy or by any failure to comply with any warranty or condition over which the mortgagee has no control or over which the mortgagee could, but has not exercised such control or by any change in the title, ownership, or management of such vessel(s); the interest of the mortgagee being that interest more particularly set forth in the mortgage on such vessel(s) in favor of the mortgagee and the note attached thereto, said mortgage and [note] being assignable to this Company upon demand provided full payment of the interest...of the mortgagee has first been paid. This coverage includes, but [is] not limited to Inchmaree protection....In the event of cancellation or modification of this Policy this Company shall give 30 days written notice of such cancellation or modification to the mortgagee prior to the effective date thereof. All other terms and conditions and valuations remaining unchanged. (Exhibit G)

4. Under Louisiana law, Endorsement 14-A is a standard mortgage clause. *May v. Market Ins. Co.*, 387 So.2d 1081 (La. 1980). Notwithstanding the fact that it is merely a rider on the insurance policy between the mortgagor and the insurance company, a standard mortgage clause creates a separate and independent contract between the insurer and the mortgagee, as if the mortgagee had procured a separate policy naming himself as the insured. *May v. Market Ins. Co., supra*, at 1084.

5. Defendant argues that a standard mortgage clause merely precludes an insurer from denying to the mortgagee coverage under the "main" policy if a condition of the policy is breached by the mortgagor, but that it

does not create additional coverage. Therefore, it is argued that because Mire Marine, the mortgagor, could not recover under the policy, [1]coverage by plaintiff is also precluded. The Court rejects this contention. Although some jurisdictions have adopted such a restrictive interpretation, *see, e.g., Avemco Ins. Co. v. Jefferson Bank & Trust Co.*, 613 S.W. 2d 436 (Mo. App. 1980); *General Motors Accceptance Corp. v. Western Fire Ins. Co.*, 457 S.W.2d 234 (Mo. App. 1970), the better rule, and the one most likely to be adopted by the Louisiana Courts, is that a standard mortgage clause broadens the scope of coverage afforded the mortgagor in the undelying policy. This is the majority view. *White Motor Corp. v. Northland Insurance Co.*, 315 F. Supp. 689 (S.D. 1970); *American National Bank & Trust Co. v. Young*, 329 N.W. 2d 805 (Mn. 1983); *Southwestern Funding Corp. v. Motors Ins. Corp.*, 59 Cal. 2d 91, 378 P.2d 361, 28 Cal. Rptr. 161 (Cal. 1963). *Piedmont Fire Ins. Co. v. Fidelity Mortgage Co.*, 35 So.2d 352 (Ala. 1948); *Don Chapman Motor Sales, Inc. v. National Savings Ins. Co.*, 626 S.W.2d 592 (Tex. App. 1982); *Underwriters at Lloyds v. American Aviation Ground Services, Inc.*, 421 So.2d 12 (Fla. App. 1982); *Security Ins. Co. of Hartford v. Commercial Credit Equip. Corp.*, 399 So.2d 31 (Fla. App.) *pet. for rev. denied*, 411 So.2d 384 (1981); *Airvac, Inc. v. Ranger Ins. Co.*, 266 So.2d 178, 180 (Fla. App. 1972); *National Cas. Co. v. GMAC*, 161 So.2d 848 (Fla. App. 1964)' *Reed v. Firemans Ins. Co.*, 80 A. 462 (N.J. App. 1911).

6. While all clauses of an insurance contract should be construed together, and the provisions of a mortgage clause must be read

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[1]We agree with the defendant's contention that no coverage for the theft of the vessel is afforded in the underlying policy, including the Inchmaree clause. *See Cambre v. Travelers Indemnity Co.*, 404 So.2d 511 (La. App. 4th Cir. 1981) and the cases cited therein.

> together and harmonized with the balance of the policy when reasonably possible, the mortgage clause must prevail in the case of an irreconcilable conflict between it and other provisions of the policy. That is, insofar as the provisions of the policy are inconsistent with and antagonistic to the clause protecting the interest of the mortgagee, they must be regarded as inapplicable in determining his rights.

American National Bank & Trust Co. v. Young, supra, at 812 (quoting 11 G. Couch, *Couch on Insurance* §42:686 at 345 (1963 and Supp. 1976)); *Security Ins. Co. v. Commercial Credit Equip. Co., supra*, at 34.

> 7. A contract of insurance, like any other agreement, is the law between the parties, and every stipulation therein must be construed as written. The rules established for the interpretation of written instruments in general apply in the construction of insurance policies.

Cambre v. Travelers Indem. Co., 404 So.2d 511, 513 (La. App. 4th Cir. 1981)(*quoting Harmon v. Lumberman's Mutual Cas. Co.*, 247 La 263, 170 So.2d 646, 651 (La. 1965)).

8. By its plain terms, Endorsement 14-A insures the interest of the mortgagee against "*any* act of omission or neglect of the mortgagor." (Emphasis supplied) Since the negligence of the mortgagor was the proximate cause of the loss of the vessel by theft, and since it is not contended that the plaintiff was in any way negligent or had any control over the activities of Mire Marine with regard to the

safekeeping of the SUZIE, plaintiff is entitled to recover under the policy.

9. In any event, if the meaning of Endorsement 14-A is unclear, under Louisiana law, it must be construed "against the insurer who wrote it and should be read liberally so as to indemnify the insured." *Walter v. Marine Office of America*, 537 F.2d at 95.

10. Let judgment be entered in favor of plaintiff, Ingersoll-Rand Financial Corporation and against defendant, Employers Insurance of Wausau in the sum of $45,480.38, plus interest from the date of loss and all costs of this proceeding.

New Orleans, Louisiana this 25th day of May, 1984.

/s/ Veronica D. Wicker

UNITED STATES DISTRICT JUDGE